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In the Supreme Court of the United States

JOSE ANTONIO LOPEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT.

REYMUNDO TOLEDO-FLORES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writ Of Certiorari To The United States Court of Appeals for the Eighth and Fifth Circuits

BRIEF FOR HUMAN RIGHTS FIRST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the term "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(B) encompasses a state felony conviction for simple possession of a controlled substance.

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INTRODUCTION

Human Rights First, as *amicus curiae*,[1] submits this brief to alert the Court of the impact its decision may have on refugees and on this Nation's compliance with its international treaty obligations concerning refugees.

Under U.S. law, a refugee who is convicted of an "aggravated felony" is automatically barred from receiving asylum. Such a conviction is also a presumptive bar to "withholding of removal" – the form of protection granted to a refugee if there is a clear probability that her life or freedom would be at risk if she returned to her home country.

If the Government's position in this case is adopted, refugees who have fled political and religious persecution can be returned to nations where their lives and freedom are threatened, on the basis of a single state conviction for simple drug possession with no proof at all of an intent to engage in illicit drug trafficking. This is not what Congress intended. Indeed, to accept the Government's position would risk putting this Nation in violation of the Protocol Relating to the Status of Refugees, under which it agreed that it would not return a refugee to persecution as a consequence of her criminal conduct in this country unless she were convicted of a "particularly serious crime" and thus presented a danger to the community. This Court has long recognized that statutes should not be construed in a manner that would put the United States in violation of the law of nations, unless the language of the statute unambiguously compels such a result. See *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The treaty

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[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and its counsel has made a monetary contribution to the preparation or filing of this brief.

obligations discussed herein provide an additional reason to reject the Fifth and Eighth Circuits' reading of the statutes at issue, even assuming that their reading is permissible under those statutes.

INTEREST OF *AMICUS CURIAE*

Since 1978, Human Rights First (formerly known as the Lawyers Committee for Human Rights) has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees, including the right to seek and enjoy asylum.

Human Rights First grounds its refugee protection work in the standards set out in the 1951 Convention Relating to the Status of Refugees (the "Convention") and the 1967 Protocol Relating to the Status of Refugees (the "Protocol"), as well as other international human rights instruments. Human Rights First advocates that U.S. law and policy adhere to the standards set forth in these agreements.

Human Rights First operates one of the largest pro bono asylum representation programs in the country. With the assistance of volunteer attorneys, Human Rights First provides legal representation without charge to hundreds of indigent asylum applicants. Human Rights First has also conducted research, convened legal experts, and provided guidance to assist in the development of effective and fair methods for excluding from refugee protection those who are not entitled to the protection of the Convention and Protocol. See, *e.g.*, HUMAN RIGHTS FIRST, REFUGEES, REBELS & THE QUEST FOR JUSTICE (2002).

In order to protect the rights of the refugees it assists and to ensure that the protections guaranteed to them under the Convention and the Protocol remain available to refugees in the United States generally, Human Rights First addresses legal developments that would lead the United States to return refugees to persecution even though they are entitled

to protection as a result of the U.S.'s commitment to abide by these treaty obligations. Thus Human Rights First has a profound interest in the outcome of these cases.

Given Human Rights First's experience and perspective in this important area of law, it is uniquely well situated to assist the Court in understanding the relationship between the question presented here and the laws governing asylum and refugees, as well as the risk that the Fifth and Eighth Circuits' analysis poses to the United States' compliance with its international legal obligations arising under the Protocol and Convention.

STATEMENT

The cases before the Court concern the proper interpretation of the term "aggravated felony" as defined in the Immigration and Nationality Act ("INA"). As discussed further below, the Court's resolution of that question will have serious implications for some refugees because of how that term is incorporated into the statutes involving asylum and "withholding of removal."

The INA defines the term "aggravated felony" as including

> * * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code)

8 U.S.C. § 1101(a)(43)(B).[2] The term "aggravated felony" applies to an offense "whether in violation of Federal or State law." *Id.* § 1101(a)(43).

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[2] Section 102 of the Controlled Substances Act defines "controlled substance" in a manner not relevant here; it does not define the term "illicit trafficking." See 21 U.S.C. § 802.

Section 924(c)(2) of Title 18 in turn defines a "drug trafficking crime" as

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2). For the parties in the instant cases, the most relevant clause in this statute is the first one: "any felony punishable under the Controlled Substances Act." *Id.*

In the decisions under review, the Fifth and Eighth Circuits have interpreted this statutory scheme to mean that the category of "aggravated felonies" includes a state felony conviction for mere possession of a controlled substance—a crime that includes no element of "illicit trafficking" and that would generally be punished only as a misdemeanor under federal law. Thus those courts (as well as the Government) understand "any felony punishable under the Controlled Substances Act" to include "any ***state*** felony punishable under the Controlled Substances Act ***even as a misdemeanor.***"

Among other things, this interpretation ignores the fact that Congress referred to "drug trafficking" crimes under Section 924(c) as a subset of "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B). Thus, quite sensibly, Congress did ***not*** intend to include all drug-related offenses, however minor, in its definition of "aggravated felony," but instead focused on offenses that actually involve the sale or distribution of controlled substances. A state conviction for simple possession does not fit within this definition. As described further below, the interplay between these statutes and the Protocol supports a narrow reading of the statutory definition of "aggravated felony."

SUMMARY OF ARGUMENT

The definition of the term "aggravated felony" has important implications in the context of asylum, separate and apart from its implications for "cancellation of removal" (*Lopez*) and sentencing (*Toledo-Flores*). A refugee who has been convicted of an "aggravated felony" in the United States is automatically ineligible for asylum, without exception. 8 U.S.C. § 1158(b)(2)(B)(i). Additionally, an asylum applicant or other immigrant who has been convicted of an "aggravated felony" is presumptively ineligible for "withholding of removal"—the relief granted to a refugee if her life or freedom would be threatened if she were to be returned to her country of nationality. 8 U.S.C. § 1231(b)(3). And if the refugee received a sentence of five years or longer for the crime—even if it was a suspended sentence—the bar to "withholding of removal" becomes absolute. *Id.*

This issue has grave implications for this Nation's commitment to protect those who have fled from political, religious, and other kinds of persecution. Under the Fifth and Eighth Circuit's decisions, a possession conviction that may subject a U.S. citizen to probation and participation in a drug-treatment program would operate as a categorical bar for a refugee-seeking asylum. The immigration judge would have no discretion whatever to grant asylum, regardless of how great the risk of persecution the refugee faces in her home country. And a conviction for drug possession could mean that a person who has already been granted asylum will be returned to a country where she will face a threat to her life or freedom.

When it acceded to the Protocol, the United States committed to provide certain substantive protections to refugees, regardless of their legal status. Chief among these is the protection against "*refoulement*" to persecution—the return of the refugee to a place where her life or freedom would be threatened. Although the country of refuge may

deny protection against *refoulement* based on criminal convictions in that country, this bar is limited to those "who, having been convicted of a final judgment of a particularly serious crime, constitute[] a danger to the community of that country." CONVENTION, art. 33(2) (incorporated by reference and reproduction by the Protocol).

To accept the Government's position in this case would put the United States in violation of its commitments under the Protocol and the Convention—a result that Congress presumptively did not intend. Even under the restrictive federal Controlled Substances Act, it is difficult to imagine how a simple possession offense with no proof of "trafficking" could be considered a "particularly serious crime" that necessarily renders a person a "danger to the community." Indeed, even the federal government classifies nearly all first-time drug possession offenses as misdemeanors, 21 U.S.C. § 844(a)—a fact quite inconsistent with the suggestion that a simple possession conviction can be an "aggravated felony" and thus a "particularly serious crime."

A statute may not be construed in a manner that would put the United States in violation of its international treaty obligations unless its language unambiguously compels that result. *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, to the extent that this statutory scheme is susceptible to more than one meaning, this doctrine provides an additional reason to adopt a reading that limits "aggravated felon[ies]" to drug crimes involving "illicit trafficking"—or, at the very least—that excludes state convictions for simple possession.

ARGUMENT

I. The United States has agreed to protect refugees from *refoulement* to persecution, and its statutes were intended to reflect that commitment.

Almost 40 years ago, the United States acceded to the Protocol Relating to the Status of Refugees. In so doing, the United States made a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *Immigration & Naturalization Serv.* v. *Stevic*, 467 U.S. 407, 416 (1984); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 8 (rev. ed. 1998). The United States was actively involved in drafting the Convention and creating an international refugee protection regime to ensure the protection of those who flee persecution.[3]

Article 33 of the Convention is incorporated into the Protocol by reference and reproduction. The first paragraph of Article 33 "provides an entitlement for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). Specifically, the first paragraph states:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,

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[3] See Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950, at *http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.htm?tbl=PROTECTION&page=home&id=3ae68c248.*

> nationality, membership of a particular social group or political opinion.

PROTOCOL, art. 33, 19 U.S.T. 6223. This is commonly known as the protection of "non-*refoulement*." As the Secretary of State correctly explained when the Protocol was under consideration: "[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened.'" *Stevic*, 467 U.S. at 428; see also CONVENTION, prbl. ¶ 2 (these provisions were intended to address the international community's "profound concern for refugees" and "to assure refugees the widest possible exercise of [their] fundamental rights and freedoms").

The second paragraph of Article 33 describes two narrow categories of refugees who are not entitled to this protection, in view of the danger they would present to the host country:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, ***or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country***.

Id. art. 33(2) (emphasis added).

Congress enacted the Refugee Act in 1980 for the primary purpose of bringing the United States into conformance with the language and requirements of the Protocol and Convention. See *Cardoza-Fonseca*, 480 U.S. at 436. The Act reaffirmed this Nation's commitment to "one of the oldest themes in [its] history—welcoming homeless refugees to our shores." S. Rep. No. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

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As part of that effort, Congress amended the Immigration and Nationality Act ("INA") to add the provision codifying the method by which a refugee can obtain asylum. 8 U.S.C. § 1158; see *Cardoza-Fonseca*, 480 U.S. at 423. The United States will recognize a refugee's status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

Congress also amended the provision in the INA permitting refugees to terminate removal proceedings against them, providing that the Attorney General will not return any alien to a country if he concludes that the alien's life or freedom would be threatened because of persecution. *Stevic*, 467 U.S. at 409. This form of protection—known as "withholding of removal"—is mandatory (not discretionary) and is intended to codify the non-*refoulement* obligation under the Convention. See 8 U.S.C. 1231(b)(3)(A); *Stevic*, 467 U.S. at 421 (U.S. can meet its obligations under the Protocol by providing either asylum or withholding of removal to an alien who meets the definition of a refugee). Eligibility for withholding of removal requires a demonstration of a "clear probability" that the alien's life or freedom would be threatened. U.S.C. § 1231(b)(3)(A) & (b)(3)(B).[4]

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[4] The United States, in contrast to other parties to the Protocol, requires a higher standard of proof to establish entitlement to withholding of removal than the "well-founded fear" standard that defines a refugee under Article I of the Convention (and that is the standard for asylum under U.S. law). GUY S. GOODWIN-GILL, THE REFUGEE IN INT'L LAW 136, 138 (1996); *Stevic*, 467 U.S. at 428. Withholding of removal is mandatory for refugees who meet this higher threshold, whereas asylum is formally discretionary. U.S.C. § 1231(b)(3); 8 U.S.C. § 1158(b)(1); *see Stevic*, 467 U.S. at 4 *Cardoza-Fonseca*, 480 U.S. at 423.

In seeking protection in the U.S., refugees generally apply for both asylum and withholding of removal. There are important differences between these two types of relief, however. For example, an asylee can work without an employment authorization document and can obtain an unrestricted social security card. See U.S. Citizenship & Immigration Serv., *Types of Asylum Decisions*, *http://www.uscis.gov/graphics/services/asylum/types.htm#grant*. She may apply for a refugee travel document that will allow for travel abroad. See 8 C.F.R. § 223.1(b). And she may apply to adjust her status to that of legal permanent resident one year after receiving asylum, putting her on the path to U.S. citizenship. See 8 C.F.R. § 209.2(a). In addition, as recommended by the Final Act of the Conference that adopted the Convention, in order to preserve family unity, an asylee can apply for derivative asylum status for her spouse and minor children. 8 U.S.C. § 1158(b)(3).[5]

While a refugee who is granted withholding of removal will still be protected from deportation to her country of persecution, she could still be deported to another country. She is also not entitled to bring her spouse and children to safety in the United States or to any of the other benefits of asylum described above.

II. U.S. law bars a person convicted of a "particularly serious crime" from both asylum and withholding of removal, and it equates a "particularly serious crime" with an "aggravated felony" under the INA.

In the context of both asylum and withholding of removal, Congress added language that tracks the exception

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[5] See also UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ch. VI (Reedited 1992) ("HANDBOOK") (attaching recommendation of the Final Act of the Conference).

in the second paragraph of Article 33. Thus it excepted any refugee who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community" from the benefits of both of these statutes. 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1253(h)(2)(B), *repealed and recodified*, 8 U.S.C. § 1231(b)(3)(B)(ii) ("the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community").

Congress has generally equated "aggravated felony" with "particularly serious crime" under the INA. See 8 U.S.C. § 1101(a)(43); see also 8 U.S.C. § 1158(b)(2)(B)(i). "Aggravated felony," in turn, is defined by the INA as follows:

> * * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code).

8 U.S.C. § 1101(a)(43)(B). It is that definition that is at issue in these companion cases. As shown below, because an alien becomes ineligible to remain in the United States upon conviction of an "aggravated felony," this Court's interpretation of that term in this case will have dramatic implications for immigrants who face persecution if they are returned to their countries of nationality.

A. A person who commits an "aggravated felony" is automatically ineligible for asylum.

As noted above, the U.S. will recognize a refugee's status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

A refugee who has committed an "aggravated felony" while in the United States, however, is automatically ineligible for a grant of asylum, notwithstanding her fear of persecution. See 8 U.S.C. § 1158(b)(2)(A)(ii) & (b)(2)(B)(i). As discussed above, Section 1158(b)(2)(A)(ii) of Title 8 provides categorically that asylum is not available to one convicted of a "particularly serious crime." That statute further provides that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i). These provisions thus erect an automatic bar to asylum for anyone who has been convicted of an "aggravated felony."

The implications of this bar to asylum are grave. As discussed above, a grant of asylum carries with it a number of important rights and benefits that assist a refugee and her family to become integrated into American society, including the ability to work without an employment authorization document, to apply after one year to adjust her status to that of a legal permanent resident, and to apply for derivative asylum status for immediate family members. Under the Fifth and Eighth Circuits' reading of the relevant statutes, a refugee convicted of a single count of drug possession and sentenced to probation and a treatment program would be denied all of these important benefits of asylum, if she happened to live in a state that identifies such a crime as a felony.

B. A person who commits an "aggravated felony" is presumptively ineligible for withholding of removal.

A person who is not a U.S. citizen and lacks valid immigration status may be "removed" on that basis. Likewise, a person who has been granted legal status in this country, even a lawful permanent resident, can be "removed" if she engages in criminal conduct. As noted

above, however, a refugee will be entitled to "withholding of removal" if she can show that her life or freedom would be threatened upon her return on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 U.S.C. § 1231(b)(3)(A).

"Withholding of removal" is not available if the Attorney General decides that "the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii).[6] Although the statute itself does not define the term "particularly serious crime," the final clause of Section 1231(b)(3) provides:

> for purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from

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[6] The regulations implementing the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contain an identical exception barring "withholding of removal" for those convicted of "particularly serious" crimes. See 8 C.F.R. § 208.16(d)(2) (2001). Those convicted of "particularly serious crimes" do remain eligible for *deferral* of removal, which does not result in a grant of U.S. residency, does not necessarily result in a release from custody, and is subject to termination if the conditions change. See 8 C.F.R. § 208.17(a), (b)(i)-(iv). Furthermore, to establish eligibility for deferral of removal, an alien must establish that it is "more likely than not" she would be tortured by, or with the acquiescence of, government officials acting under color of law. *Id.* §§ 208.17(a), 208.18(a). Deferral of removal thus will not protect refugees who would face a probability of persecution in their home countries if that persecution does not meet the definition of "torture" or takes place without the requisite level of state involvement.

> determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3) (final clause).[7] Thus, by statute, a refugee convicted of an aggravated felony and sentenced to at least five years of imprisonment is ***automatically*** deemed to have committed a "particularly serious crime" that bars her from receiving "withholding of removal." *Matter of Y-L-*, 23 I&N Dec. 270, 273 (A.G. 2002).

If a state possession felony is deemed an "aggravated felony" under the statutes at issue here, even a refugee with a suspended sentence who serves little or no time could fall under this automatic bar to withholding of removal. See 8 U.S.C. § 1101(a)(48)(B (five-year threshold includes suspended sentences). For example, if petitioner Jose Antonio Lopez had otherwise been entitled to "withholding of removal," he would have been denied that protection under the automatic bar in light of his state felony conviction for aiding and abetting possession, for which he was sentenced to five years and yet served only 15 months. J.A. 22. Thus a refugee in his position could be returned to death or death in a country he had fled because of political, religious, or other persecution, solely because of a single possession conviction that entailed relatively little jail time.

For refugees with a total sentence of less than five years, the Attorney General has discretion to conclude that the "aggravated felony" is not a "particularly serious crime" and hence does not bar withholding of removal. *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006) (citing 8 U.S.C. § 1231(b)(3)(B)(ii)). Under the Attorney General's decision in

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[7] Prior law provided that *all* aggravated felonies constituted "particularly serious crime[s]." See 8 U.S.C. § 1253(h)(2) (1994). That provision was later eliminated and replaced by the current definition of "particularly serious crime" contained in the last clause of 8 U.S.C. § 1231(B)(3) (cited above).

Matter of Y-L-, however, drug offenses with a sentence of less than five years that are deemed to be "drug trafficking" aggravated felonies trigger a ***presumptive*** bar on withholding of removal, with very limited exceptions. Although the convictions before the Attorney General in that case actually involved evidence of "trafficking," the Government will likely apply the *Y-L-* presumption to any crime that falls within the definition of "drug trafficking crime" as that term is used in 8 U.S.C. § 1101(a)(43)(B). Based on the Government's position here, a state felony for simple possession would fall within that definition.

In the *Y-L-* case, the Attorney General concluded that such drug-related aggravated felonies presumptively constitute "particularly serious crimes" within the meaning of the statutes governing withholding of removal. 23 I&N Dec. at 274 (overruling *Matter of S-S-*, Interim Decision 3374 (BIA 1999), which invoked a case-by-case review to determine which crimes are "particularly serious"). He further concluded that only under the most "extraordinary and compelling" circumstances would departure from this interpretation be warranted or permissible. *Id.* He noted that, at a minimum, those circumstances would need to include ***all*** of the following criteria:

> (1) a very small quantity of the controlled substance;
>
> (2) a very modest amount of money paid for the drugs in the offending transaction;
>
> (3) merely peripheral involvement in the criminal activity, transaction, or conspiracy;
>
> (4) the absence of any violence or threat of violence, implicit or otherwise;
>
> (5) the absence of any organized crime or terrorist organization involvement, direct or indirect; and

> (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

Id. at 276-77.

According to the Attorney General, only if ***all*** of these criteria were present would it be appropriate to consider whether other, additional "unusual circumstances" justify departure from the presumption that drug-related aggravated felonies are "particularly serious." *Id.* at 277; *Tunis*, 447 F.3d at 449. Additionally, the Attorney General stated that facts such as "cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence" do not justify deviation from the presumption. 23 I&N Dec. at 277.

To be sure, the *Y-L-* standard purports to create a rebuttable presumption and not a per se rule that drug-related aggravated felonies with sentences of less than five years are "particularly serious." See *Ford* v. *Bureau of Immigration & Customs Enforcement's Interim Field Office Director*, 294 F. Supp. 2d 655, 661-62 (M.D. Pa. 2003) (stating "[t]he Attorney General in *Matter of Y-L-* stopped short of creating a per se rule that all drug trafficking convictions constitute "particularly serious crimes"); 8 C.F.R. § 208.16(d)(3) ("[I]t shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime."). As a practical matter, however, the standard set out by the Attorney General in *Y-L-* is close to a complete bar on withholding of removal, simply because the exception is so narrow. Although a first-time simple possession offense with a sentence of less than five years might meet most or all of the *Y-L-* factors listed above, that fact alone would not guarantee that "withholding of removal" would be available under the terms of *Y-L-*.

As this discussion illustrates, this Court's interpretation of the term "aggravated felony" may have a significant impact on a refugee's ability to obtain asylum and to avoid *refoulement* to persecution in her home country. That impact cannot be ignored, particularly in light of the treaty issues to which we now turn.

III. The *Charming Betsy* doctrine compels a narrow reading of the definition of "aggravated felony."

This Court presumes that Congress intends its statutes to comply with the law of nations, unless the statute unambiguously states otherwise. "It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains * * * .'" *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). Thus, a statute that is susceptible to more than one reading should be interpreted in a manner that avoids conflict with the international treaty obligations of the United States. This basic rule has been followed by this Court in a variety of contexts.[8]

The briefs submitted by other *amici* in these cases explain in detail why the definition of "aggravated felony" should be understood to include only those drug crimes that

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[8] *Weinberger*, 456 U.S. at 29-30, 32-33 (looking to international law in interpreting statute prohibiting employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (in maritime tort case, looking to law of nations in determining statutory construction of Jones Act); *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913) ("it should not be assumed that Congress proposed to violate the obligations of this country to other nations"); *Chew Heong* v. *United States*, 112 U.S. 536, 539-40 (1884) (interpreting immigration statute so as to avoid conflict with treaty right of Chinese alien to enter the United States).

actually involve *"illicit trafficking* in a controlled substance"—and, at the very least, why they cannot include state possession felonies that federal law would regard as only misdemeanors. To the extent that the definition of "aggravated felony" is also susceptible to a different meaning, however—and the Fifth and Eighth Circuits believe that it is—*Charming Betsy* dictates that it be interpreted in a manner consistent with the Nation's treaty obligations. As discussed below, interpreting the statute to encompass these types of simple possession crimes would put the United States in violation of its treaties relating to the status of refugees. There is no reason to believe that Congress intended such a result.

A. The U.S. cannot be in compliance with the Protocol if it denies protection to those convicted of an offense that it generally regards as a misdemeanor.

The prohibition against *refoulement* to persecution is one of the core principles of the Convention (and of international refugee law generally). According to the Convention's preamble, its purpose is to ensure that refugees enjoy the widest possible exercise of the fundamental rights and freedoms guaranteed to all people. CONVENTION, prbl. ¶ 2. As discussed above, Article 33(1) of the Convention states that: "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Thus Article 33(1) affirms the basic principle that a person must not be removed from his country of refuge and sent back to a place where his life or freedom would be jeopardized. And the "particularly serious crime" exception of Article 33(2) creates only a very limited exception to the

fundamental right to non-*refoulement*.[9] See James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 293 (2001) (Article 33(2) authorizes *refoulement* to persecution only where it is necessary to protect the community in the host nation from an unacceptably high level of danger).

There can be no doubt that the United States would run afoul of its promise to protect all refugees except those who have committed a "particularly serious offense" if it were unwilling to protect those who were convicted of a crime punished as a misdemeanor under federal law. The United States' own controlled substances statutes thus provide the best evidence that a simple possession offense cannot be "particularly serious" for purposes of the Convention.

In general, federal law punishes the crime of drug possession only as a misdemeanor. See 21 U.S.C. § 844(a) ("Penalties for Simple Possession") (punishment is limited to less than one year unless other circumstances are present, as where the offender has been convicted of a similar crime before or where the drug is of a significant quantity and includes cocaine base); 18 U.S.C. § 3559(a)(6). Indeed, if a person is convicted of possessing a controlled substance in violation of 21 U.S.C. § 844 and has no previous drug-related convictions, "the court may, with the consent of such person, place him on probation for a term of not more than one year ***without entering a judgment of conviction.***" 18 U.S.C. § 3607(a) (emphasis added). Allowing a first-time offender to escape entry of a judgment of conviction for a

[9] In the record of proceedings connected with the adoption of Article 33(2), the U.S. delegate explained that "it would be highly undesirable to suggest in the text of [Article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." CONVENTION, *travaux préparatoires*. See Factum of the Intervenor, UNHCR, *Suresh* v. *Minister of Citizenship & Immigration*, S.C.C. No. 27790, at ¶ 63 (Mar. 8, 2001), *reprinted at* 14 INT'L J. REFUGEE L. 141.

crime is hardly consistent with the suggestion that that crime is "particularly serious" for purposes of the Protocol.

Congress's use of the term "serious" in other related contexts is also instructive. The offenses Congress identifies under its definition of "serious drug offense" in the main penalty provision under the Criminal Code involve either actual trafficking, participation in a continuing criminal enterprise, importing or exporting, or possession ***with the intent*** to "manufacture, distribute, or dispense" a controlled substance. See 18 U.S.C. § 3559(c)(2)(H) (citing 21 U.S.C. §§ 841(b)(1)(A), 848, 960(b)(1)(A)). Moreover, Congress penalizes those who commit a "serious drug offense" with a sentence of 10 years to life. 18 U.S.C. § 3559(c)(2); see also 18 U.S.C. § 924(e)(2)(A) (a "serious drug offense" is defined as a federal offense with a maximum sentence of 10 years or more, or a state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute" with a maximum sentence of 10 years or more). By contrast, the maximum sentence for simple possession of any drug other than cocaine base is only three years, even for repeat offenders. See 21 U.S.C. § 844(a).

The structure of the "particularly serious crime" provisions in U.S. law also supports the view that Congress could not have intended to make every simple possession felony an "aggravated felony" for purposes of the INA. Article 33(2)'s exception applies, in relevant part, to anyone "who, having been convicted by a final judgment of a particularly serious crime, ***constitutes a danger to the community of that country.***" CONVENTION art. 33(2) (emphasis added). The statutory scheme that Congress enacted to implement that exception has been interpreted to begin and end with whether the person committed a "particularly serious crime," without any case-by-case determination of "dangerousness." See, *e.g.*, *Urbina-Mauricio* v. *Immigration & Naturalization Serv.*, 989 F.2d 1085 (9th Cir. 1993) ("once a court has determined than an alien has been

convicted of a particularly serious crime, it need not make a separate finding that the alien constitutes a danger to the community; the latter follows naturally from the former"); *Matter of C.*, 20 I&N 529 (BIA 1992) (rejecting proposed two-step inquiry that would include a separate assessment of dangerousness).[10] Thus Congress presumably limited the terms "particularly serious crime" and "aggravated felony" to include only those crimes that it believed necessarily create a high risk of "danger to the community." It would be inconsistent with that presumption to interpret the definition of "aggravated felony" to include the crime of possessing a small quantity of drugs for personal use.

By definition, the term "particularly serious crime" cannot include an offense that Congress does not even regard as "serious." And given that the statutes have been found not to require a separate determination of "dangerousness," Congress must have intended the categories of "aggravated felony" and "particularly serious crime" to include only those crimes that necessarily pose a significant risk of danger to the community. For both of these reasons, to interpret the definition of "aggravated felony" to include all felony convictions for simple possession would put the United States in conflict with the Protocol, based upon the United States' own standards for the relative seriousness of crimes.

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[10] This itself is a departure from the international standard. James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 537-38 (2000) ("Under the international standard, conviction by final judgment of a particularly serious crime is a necessary, but not sufficient, condition for removal.").

B. UNHCR materials confirm that a "particularly serious crime" is one of extreme gravity.

Although the Protocol and Convention do not define "particularly serious," the U.N. High Commissioner on Refugees ("UNHCR") has provided guidance as to what types of criminal convictions could legitimately allow an exception to the obligation of non-*refoulement*.[11] Those materials demonstrate that a simple possession offense could not possibly qualify as a "particularly serious crime" that renders a person "a danger to the community" without further inquiry.

For example, the exceptions in Article 33(2) are discussed in the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. While the Handbook does not have the force of law, it does "provide significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987). As relevant here, the Handbook highlights the fact that Article 33 permits a refugee's expulsion only in "extreme cases." HANDBOOK ¶ 154.

Indeed, the "particularly serious crime" exception in Article 33(2) is even narrower than Article 1(F) of the Convention, which states that the Convention does not apply "to any person with respect to whom there are serious

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[11] The UNHCR was created in the wake of World War II to coordinate international action for the world-wide protection of refugees. Its primary purpose is to safeguard the rights and well-being of refugees. The U.S. is a member of the Executive Committee of the UNHCR.

reasons for considering that * * * he has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee." CONVENTION art. 1(F)(b) (emphasis added).[12] As the Handbook explains, "a 'serious' crime must be a capital crime or a very grave punishable act" to fall within Article 1(F). HANDBOOK ¶ 155. "Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1(F)(b)." *Id.* Obviously, a "***particularly*** serious crime" would need to be a crime that is even more grave than those "serious crimes" that fall under Article 1(F). See UNCHR Comments on Proposed Rules on "Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens: Conduct of Removal Proceedings; and Asylum Procedures," at *http://www.usaforunhcr.org* (Feb. 4, 1997) ("A 'particularly serious crime' would be an even more restrictive category" than the category of "serious" crimes to which Article 1(F) refers); accord *Matter of Frentescu*, 18 I&N 244 (BIA 1982) (recognizing that a particularly serious crime is more serious than a serious non-political crime).

Another source of guidance is the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ("GUIDELINES").[13] This document also

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[12] The history of these provisions confirms their relationship, as the discussions at the Conference of Plenipotentiaries specifically made note of the link between Article 33(2) and what was eventually to become Article 1F. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEE at 224 (1989). Therefore, Article 1(F) can aid how Article 33(2) is interpreted. See *id.*

[13] See *Castillo-Arias* v. *U.S. Atty. Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) ("Reference to the UNHCR Guidelines * * * is permissible because the U.S. Supreme Court has held that Congress intended

discusses the exceptions in Article 33(2). The Guidelines emphasize that only individuals who commit "particularly grave crimes" are subject to the second exception in Article 33(2). GUIDELINES ¶ 16. Further, the Guidelines explain that "Article 33(2) concerns the future risk that a recognised refugee may pose to the host state." *Id.* ¶ 4.

Again, Congress presumably intended its statutory scheme to comply with Article 33(2) and to be limited to such "particularly grave crimes." Obviously, a simple possession conviction—without any evidence of involvement in trafficking or other aggravating circumstances—could not possibly meet that definition.

C. U.S. treaties relating to controlled substances also support the conclusion that simple possession cannot be a "particularly serious crime."

The treaties that relate to drug trafficking further suggest that simple possession cannot be a "particularly serious" crime under international law. The United States is party to a number of treaties on narcotics, including the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Trafficking Convention"). See Martin Gottwald, *Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions*, 8 INT'L J. REFUGEE L. 81, 93 (2006) (comparing provisions of the drug conventions with provisions of the Convention Relating to the Status of Refugees). "The cornerstone of the Trafficking Convention is Article 3 on 'Offences and Sanctions,' which distinguishes between 'criminal offences' (Art. 3.2), 'serious criminal offences' (Art. 3.1 and Art. 3.7)

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to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees."); *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (noting the UNHCR's "analysis provides significant guidance for issues of refugee law").

and 'particularly serious offences' (Art. 3.5)." Gottwald, *supra*, at 94. It is Article 3.2 of this Convention that requires signatory nations to criminalize simple possession offenses, within the limits of their own constitutional law, whereas the other paragraphs of that article pertain to the actual sale and distribution of drugs. See TRAFFICKING CONVENTION, *supra*, art. 3. Under the Trafficking Convention, then, simple possession is categorized only as a "criminal offence" and not as a "particularly serious" or even "serious" offense.

Indeed, the Convention sets out a long list of factors to be considered before even a true drug distribution offense becomes "particularly serious." See TRAFFICKING CONVENTION, *supra*, art. 3.5 ("The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious * * * ."). Those factors may include the involvement of international organized crime; the involvement of the offender in other illegal activities facilitated by commission of the offense; the use of violence or arms; the fact that the offender holds a public office and that the offense is connected with the office in question; and the victimization or use of minors. *Id.* If even the distribution of narcotics is not "particularly serious" without facts such as these, then surely a simple possession offense cannot be considered "particularly serious."

CONCLUSION

In light of the implications of the issue for refugees and for the Nation's compliance with its international treaty obligations regarding refugees, *Amicus* urges this Court to reverse the decisions of the Fifth and Eighth Circuits and to adopt a narrow reading of the "aggravated felony" definition that excludes convictions for simple possession. At the very least, the definition must exclude state

possession offenses that would be considered misdemeanors under federal law.

Respectfully submitted.

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